UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC., Plaintiff, v. PC TOOLS PTY LTD., Defendant.	No. CV 07-0797 DECLARATION OF GREGG BERRETTA

Gregg Berretta states and declares as follows:

1. I am the Director of Industry Affairs for plaintiff Zango, Inc. ("Zango"). I have personal knowledge of the matters stated herein and I am competent to testify to these matters.

2. Zango is an online media company based in Bellevue, Washington that provides consumers free access to a large catalog of online videos, games, music, tools and utilities. Zango offers four downloadable software applications branded as follows: "Zango," "Seekmo," "Hotbar," and "Spam Blocker Utility." These essentially identical Zango products are offered to customers free of charge and are sponsored by advertising that customers agree to view as a condition of using the products. Zango also offers a premium version of its

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Hotbar- and Spam Blocker Utility-branded software that gives consumers access to Zango's content catalog without having to agree to see advertising.

3. Zango's proprietary software displays advertisements (to all non-premium users) while Zango customers are browsing or searching the Internet online. Zango's software is designed to locate products and services that are of interest to Zango customers. It does this by recognizing keywords from customers' Internet browser and displaying relevant advertisers' websites for matching products and services. Zango's software never collects the personal identifying information of its users.

4. On or about March 29, 2007, Google, Inc. revised its "Google Pack" software package to include a product from PC Tools called "Spyware Doctor Starter Edition" (hereinafter, "Starter Edition"). The default grouping of software in the "Google Pack" includes Starter Edition, which means that, given Google's massive Internet presence (Comscore, a web metrics measuring company, calls Google's home page – the well-known www.google.com – the most popular and most visited site on the Internet), millions of "Google Packs" including this Starter Edition component have been distributed since March 29 and installed around the world by consumers.

5. Prior to approximately March 29, 2007, Google had included within its "Google Pack" a product from spyware protection company Lavasoft AB called "Ad-Aware SE" (hereinafter, "Ad-Aware"). In communications with Zango, Lavasoft informed Zango that the only action Ad-Aware took with respect to Zango products was to notify users upon installation that Zango products will make a change to the Windows registry of the user's PC. (The Windows registry is a database which stores settings and options for the operating system for Microsoft Windows; it contains information and settings for all the hardware, operating system software, most non-operating system software, users, preferences of the PC, etc.) Ad-Aware provided users with an opportunity to choose whether to take any action with

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respect to Zango products or whether to allow Zango products to remain installed on the user's computer. This is the same warning that Ad-Aware provided to users upon installation of all non-malicious software, including such popular downloadable applications as the Google or Yahoo! toolbars.

6. On or about March 29, 2007, Starter Edition replaced Ad-Aware in the Google Pack.

7. On May 11, 2007, Zango's Director of Product Development, Val Sanford, alerted me to a potential problem involving Starter Edition and its effect on Zango's products.

8. Internal testing, performed by myself or at my direction showed that Starter Edition Version 5.0.0.169 ("Starter Edition 169") disables Zango installations to the point that existing, consensually installed Zango's software already resident on the consumer's computer no longer functions. Testing showed that Starter Edition 169 software damages Zango applications immediately upon installation, without giving any specific notice whatsoever to Zango customers or providing any opportunity for Zango customers to consent or intervene.

9. Testing also showed that, after a brief period of time following the initial disabling of Zango's software, Starter Edition 169 repeatedly delivers a specific type of message format (sometimes called a "toaster") on the user's screen stating "Malicious Action Blocked" and identifying Zango's software specifically as an "Elevated Risk." In previous communications between Zango and PC Tools, Jim Meem, the director of PC Tools' Malware Research Centre, admitted in an e-mail sent to Zango that "[w]e [PC Tools] have concluded that Seekmo [one of the four essentially identical Zango software brands] is not malicious." Attached hereto as Exhibit A is a true and correct copy of Mr. Meem's email of March 28, 2007.

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10. Testing also revealed that while the Starter Edition 169 software prevents the display of advertisements from Zango on behalf of Zango's advertising partners (which is the primary source of Zango revenue), some existing Zango customers nonetheless are still able to access the content in Zango's catalog (i.e., the movies, games, screensavers, and the like).

11. Moreover, testing showed that consumers who have Starter Edition 169 already installed on their computers are unable to install Zango's software, thereby eliminating Starter Edition users as potential customers of Zango's software. Starter Edition 169 provides no opportunity for users who wish to download and install Zango's software to ignore, allow, or otherwise stop Starter Edition 169 from blocking the installation of that software.

12. Damage to Zango's products is not limited to actions taken by the Starter Edition 169 version of Spyware Doctor as included in the "Google Pack" (which, according to licensed Internet traffic-estimating software received 1.2 million unique visits in the last 30 days). In addition to its availability in "Google Pack," Spyware Doctor is available in other editions directly from PC Tools. The same traffic-estimating software indicates 1.6 million unique visits to PC Tools' web site and other distributors of their software in the last 30 days.

13. Attached hereto as Exhibit B are true and correct copies of communications via email received by Zango technical support services from Zango customers reporting that Spyware Doctor disabled Zango products and/or that customers were prevented from installing Zango products by Spyware Doctor.

14. Since May 11, representatives of Zango, including myself, have repeatedly contacted senior PC Tools' employees, including its CEO, General Counsel, and the Head of its Malware Research Centre, to request the removal of Zango products from the Starter Edition detection database. My request to PC Tools – to remove all references to Zango from their detection database – was the least onerous request that could be made to a scanning

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application vendor. It is common knowledge in the industry that in order to reduce the time period during which users might be unprotected, detection databases can be and typically are updated hourly. Urgent updates are released immediately after a "signature" has been added to the detection database. The average update size (around 30KB) is not burdensome to consumers. My request to PC Tools was to actually reduce rather than increase the size of the database. Changing the database is something that PC Tools does many times a day during the normal course of business. Changes in the database would have no negative impact on PC Tools' existing customer base (or on future customers).

15. PC Tools publicly acknowledges the fact that their database detections are handled automatically without intervention by the user. From PC Tools website (http://www.pctools.com/spyware-doctor/features/) (accessed on May 16, 2007): "Smart Update™ is now fully automated and runs in the background without user intervention, ensuring users the most current tools, scanners and signatures to maximize protection. Furthermore, database updates will be incremental (during weekdays), meaning only new and modified definitions will be downloaded (and the complete definition file only once a week), thus allowing for faster and more frequent updates. Spyware Doctor™ V5.0 will also continue to deliver its industry leading daily updates."

16. PC Tools ignored Zango's repeated requests to remove Zango from Spyware Doctor's detection databases. Accordingly, on May 15, 2007, Zango filed suit against PC Tools. The next day, Zango notified PC Tools of its intention to seek injunctive relief via a temporary restraining order ("TRO").

17. On May 17, 2007, an attorney for PC Tools, Tarek Saad, contacted an attorney for Zango and offered assurances that Zango would be reclassified and removed from PC Tools' detection database. Nevertheless, since that date, PC Tools has failed to remove Zango from its detection database.

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18. Since May 17, 2007, PC Tools has released several new versions of Spyware Doctor. As of the date of this affidavit, the version of Spyware Doctor available on the Google Pack website is called Spyware Doctor 5.0.0.184 (SD 184"). Zango engineers have tested SD 184 and have determined that SD 184 still damages existing installations of Zango software and continues to prevent installation of Zango software by new customers.

18. PC Tools has also released versions 185 and 186 of Spyware Doctor. Our lab has tested Spyware Doctor 186 and confirmed that it continues to mislabel Zango products as "infections." Because this mislabeling erroneously leads Zango customers to remove or avoid Zango products, Spyware Doctor 186 is continuing to cause Zango to suffer irreparable harm.

19. Our engineers have determined that the only means by which Zango can be assured that the existing PC Tools customer base will ever be able to become Zango customers with certainty is to require the update of PC Tools' detection database to reflect that all references to Zango, Zango's software, Zango's websites, and all other related components and identifying characteristics are deleted and all PC Tools' clients are updated by PC Tools to reflect the new detection database. There are several reasons that requiring PC Tools to update its database is the only cure for the harm PC Tools' products are currently causing Zango. First, even if PC Tools creates a more benign version of Spyware Docotor, there is no guarantee that customers with earlier versions of Spyware Doctor that are harmful to Zango will update their computer with the more benign version. Second, Zango engineers have confirmed that once a customer installs any Spyware Doctor version before version 185, that customer's ability to install Zango products in the future is forever eliminated. Accordingly, unless Spyware Doctor updates its detection database to delete all references to Zango, Zango is forever (and unfairly) barred from an entire universe of potential customers.

20. Zango has suffered significant damage to its reputation, customer base and business model as a result of the actions of the PC Tools software described above. That

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damage includes: disabling Zango's software purchased by customers who have elected to install a premium version of that software (retail price $29.99) in order to access content from Zango's extensive catalog without having to see ads; precluding any future such customers from being able to install that premium software; destroying Zango's ability to recoup, through both paid and ad-supported software versions, the cost of acquiring and licensing for distribution the extensive content in Zango's content catalog (estimated value: several million dollars); chilling Zango's ability to partner with new content providers and distribution channels, thereby hindering Zango's expansion plans and devaluing its investment in offices, operations, infrastructure, and employees in Washington state, North America, and other parts of the world; and in other ways not yet realized or fully understood.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of May, 2007 at Bellevue, Washington.

Gregg Berretta

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for Plaintiff Zango, Inc. herein.

I hereby certify that on May 25, 2007, I electronically filed the attached foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following persons:

J. Ronald Sim
Maren R. Norton
Stoel Rives LLP
600 University Street
Suite 3600
Seattle, WA 98101-3197

and I hereby certify that I have delivered via U.S. Mail the document to the following non CM/ECF participants:

N/A

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25 day of May, 2007, at Seattle, Washington.

Joyce Abraham

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EXHIBIT A

-----Original Message-----
From: Jim Meem [mailto:jmeem@pctools.com]
Sent: Wed 3/28/2007 11:48 PM
To: Gregg Berretta; Darren Sommers; Simon Clausen; Peter Mackow
Cc: Kevin Osborn
Subject: RE: PC-Tools - Zango - Seekmo - Hotbar

Hi Gregg,

We have concluded Seekmo is not malicious. We're still weighing up how seriously to take the full screen replacement situation, but its certainly not as bad as things we saw early in 2005. We have removed the block to your URL www.seekmo.com <http://www.seekmo.com/> from the database in test right now which will go live within an hour, so as you read this those SD customers who run Smart Update will not get a block on your website. We will change the risk for the Seekmo application but that is more complicated because currently we detect Seekmo as (1) Seekmo components (2) Zango components which obviously were reused in Seekmo (3) 180 Common Components and (4) Hotbar components, mostly keys. It may be we will have to review Zango and Hotbar before we can sort this out correctly.

Jim

EXHIBIT B

From: vipsupport [vipsupport@hotbar.com]
Sent: Wednesday, May 16, 2007 12:21 AM
To: Rachel Shafir
Subject: FW: RE: Re:Unable to load Hotbar [941980:457277]

-----Original Message-----
From: "VIP Support" <vipsupport@hotbar-inc.com>
Sent: 5/9/2007 11:59 AM
To:
Subject: FW: RE: Re:Unable to load Hotbar [941980:455493]

Dear Peter,

Thank you for your reply and information.

Unfortunately there is a problem of incompatibility between Hotbar and Spyware Doctor.
Sometimes, even though Hotbar is added to the "permitted files" list, and even if you remove Spyware Doctor from your computer, Hotbar may not function properly.
We have contacted Spyware Doctor and informed them about the problem, and they are working to fix it, but so far the issue has not been solved.

We therefore suggest to cancel your membership to Hotbar.
We apologize for any inconvenience. Please let us know how you wish to proceed.

Have a great day,

Keren C.
VIPsupport@hotbar.com
VIP Customer Service
Hotbar.com, Inc.

-----Original Message-----
From:
Received: 5/7/2007 5:35 PM
To: vipsupport@hotbar.com
Subject: RE: Re:Unable to load Hotbar

Dear Support,

My order no. is Swreg Order Number: U22439808
I've opted for the paid version yr ad claim there will be no
pop up,spyware and other malicious adwares and such.

Hver my Spyware doctor is almost any attempt for me to install hotbar due to the presence of large amount of the adware,malware and such.

How do I load yr product.
I want to use Hotbar.

Rgds
Peter

From: vipsupport [vipsupport@hotbar.com]
Sent: Wednesday, May 16, 2007 12:20 AM
To: Rachel Shafir
Subject: FW: Re: Keep losing my Hotbar icons [930492:457276]

-----Original Message-----
From:
Received: 4/22/2007 6:17 PM
To: "VIP Support" <vipsupport@hotbar-inc.com>
Subject: FW: Re: Keep losing my Hotbar icons [930492:451434]

Keren C.

Thanks for the comeback on my problem... However, it seems Hotbar is having problems with many of the Antivirus programs... I recently had AVAST and had the same problem... That...is why I switched to AVG.. didn't have any problems with your Hotbar... until the Spyware Doctor problem..

I really like the capabilities of your Hotbar and would like to download it again.. However, every time I got to WWW.hotbar.com , up comes your Home page.. and it only tells all about Hotbar.. and there is no place on the page to move to a download page..

Please advise... In the meantime, I will look for the "allow" template in Spyware Doctor...

Robert...

----- Original Message -----
From: VIP Support
To:
Sent: Sunday, April 22, 2007 3:28 AM
Subject: RE: Keep losing my Hotbar icons [930492:451434]

Dear Robert,

Thank you for your mail.

Unfortunately there is a problem of incompatibility between Hotbar and Spyware Doctor.
Sometimes, even though Hotbar is added to the "permitted files" list, and even if you remove Spyware Doctor from your computer, Hotbar may not function properly.
We have contacted Spyware Doctor and informed them about the problem, and they are working to fix it, but so far the issue has not been solved.

We therefore suggest to cancel your membership to Hotbar.
Please let us know how you wish to proceed.

Have a great day.

Keren C.
VIPsupport@hotbar.com
VIP Customer Service
Hotbar.com, Inc.

-----Original Message-----
From:
Received: 4/20/2007 5:19 AM
To: vipsupport@hotbar.com
Subject: RE: Keep losing my Hotbar icons

Sir...

I have been having a lot of trouble keeping my Hotbar Premium Icons in my e-mail...

I recently uninstalled my AVAST antivirus which was knocking out my Hotbar..

I reinstalled AVG and was having NO problems..

Then tonight I ran my Spyware Doctor program.. and looked up ... and my Hotbar was gone again...

Sure be nice to keep it in my e-mails...

Programs I am running periodically are: Register Mechanic.... Spyward Doctor... and of course my AVG program runs in the background...

Need some help.. or I am going to give up on the Hotbar icons...

Looking forward to your assistance....

Robert

No virus found in this incoming message.
Checked by AVG Free Edition.
Version: 7.5.463 / Virus Database: 269.5.7/771 - Release Date: 4/21/2007 11:56 AM